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Federal Communications Commission  
Office of the Secretary

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March 5, 2004

Mr. Jeffrey Steinberg  
Deputy Chief  
Commercial Wireless Division  
Federal Communications Commission  
Washington, DC 20554

Re: Recommended Approach on Identification of Historic Properties  
On FCC Nationwide PA

Dear Mr. Steinberg:

Through this letter the Advisory Council on Historic Preservation (ACHP) wants to address the legal foundation behind the approach it has proposed, per its letter of February 19, 2004, to the identification of historic properties on the draft Nationwide Programmatic Agreement (Nationwide PA).

Specifically, what follows is the ACHP's legal basis for its decision to recommend, for purposes of the Nationwide PA, a departure from the procedures in subpart B of the ACHP's regulations implementing Section 106 of the National Historic Preservation Act, by providing a more tailored, streamlined approach for identifying historic properties that may be visually affected by communications towers. As explained below, the ACHP also believes that its decision to recommend such a streamlined approach for identifying historic properties subject to a tower's visual effects is reasonable and legally permissible notwithstanding the ACHP's conclusion that a different approach should be used for identifying historic properties subject to direct effects due to the construction of communications towers.

#### Statutory and Regulatory Background

Section 106 of the National Historic Preservation Act (NHPA) imposes two requirements on Federal agencies: (1) that they take into account the effects of their undertakings on historic properties, and (2) provide the ACHP a reasonable opportunity to comment on such undertakings. 16 U.S.C. § 470f.

Pursuant to its broad regulatory authority, 16 U.S.C. 470s, the ACHP has issued regulations that flesh out how agencies meet their Section 106 requirements. Of relevance to the issues in this letter, the regulations define "historic properties" and provide different processes agencies can follow in meeting their Section 106 responsibilities.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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"Historic properties" are defined under the ACHP's regulations to include those that (a) are listed on the National Register, (b) have been formally determined eligible for such listing by the Keeper, or (c) meet the criteria for listing in the National Register. The ACHP's interpretation of the scope of this term has been upheld recently. See Nat'l Mining Ass'n v. Slater, 167 F. Supp. 2d 265 (D.D.C. 2001).

As mentioned, the ACHP's regulations provide different ways of meeting the requirements of Section 106. The process followed by most agencies – what could be called the default process – is outlined in subpart B of the regulations, 36 C.F.R. part 800, subpart B. This is a process that has been upheld (with exceptions not relevant to our issues) as consistent with the NHPA and within the ACHP's regulatory authority. See Nat'l Mining Ass'n. Federal agencies can also meet their Section 106 requirements through a process tailored to their own needs. Specifically, Federal agencies can enter into a Programmatic Agreement, whereby a Section 106 process different from that outlined in subpart B is established. 36 C.F.R. § 800.14(b) ("Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement").

### Discussion

At the outset, the ACHP's proposed approach does not alter the statutory or regulatory definition of "historic properties" in any way. The properties within the scope of review are still those that (a) are listed on the National Register, (b) have been formally determined eligible for such listing by the Keeper, or (c) meet the criteria for listing in the National Register. The list on the proposed approach specifically includes those properties under categories (a) and (b), and incorporates properties under category (c) by having the State Historic Preservation Office identify and evaluate them ahead of time (rather than doing so on a case-by-case basis with the Federal agency as is done under the process outlined in subpart B of the implementing regulations). Indeed, a federal court has held that the requirement under subpart B of the implementing regulations that federal agencies conduct surveys to identify historic properties, while upheld as a legally permissible construction of the statute, is not mandated by the plain meaning of Section 106. The modified procedures proposed for the Nationwide PA effectively place the burden of conducting surveys for identifying potentially eligible properties upon the SHPO/THPO rather than upon the federal agency, consistent with that holding. See Nat'l Mining Ass'n v. Slater, 167 F. Supp at 22-23.

Nor does the NHPA provide a specified procedure for identifying such properties. The implementing regulations under subpart B provide that agencies should make a "reasonable and good faith effort" to identify such properties considering the circumstances of the project. See 36 C.F.R. § 800.4(b)(1). The circumstances to be considered in figuring out the level of effort include, among other things, "the magnitude and nature of the undertaking and the degree of Federal involvement." *Id.* No court has invalidated this aspect of the regulations, much less determined that it conflicts with the NHPA.

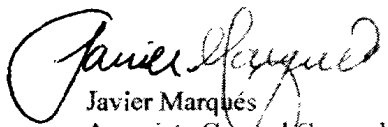
The ACHP's recommendation for the Nationwide PA reflects its conclusions as to what such a "reasonable and good faith effort" should entail in the unique context of construction of communications towers that may have visual effects on historic properties. In recommending that its procedures be simplified and streamlined in this context, the ACHP has considered the factors mentioned in its regulations, including the level of Federal involvement and other factors. As to Federal involvement, the ACHP notes that the Commission has for some time deregulated its authorization procedures for tower construction. For example, licenses for many services cover large geographic areas rather than specific sites. As a result, licensees in many, if not most,

services have a primary role in making tower siting decisions without the Commission's involvement. The ACHP has also considered the nature of the federal undertakings involved, including the Commission's statutory responsibility to "make available, so far as possible ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service ....", whose purposes include national defense and promoting safety of life and property. 47 U.S.C. § 151. In these circumstances, the ACHP has endeavored to develop a more streamlined and predictable process for identification of "historic properties" that ensures achievement of these statutory goals without sacrificing the goals of historic preservation.<sup>1</sup>

For several reasons, the ACHP believes, however, that the development of streamlined procedures is neither necessary nor practicable when identifying historic properties subject to direct effects from towers. The area of potential effect (APE) for direct effects on historic properties is limited to areas where tower construction will disturb the ground or physically alter an above-ground property. Requiring a thorough search for historic properties in such small areas does not present the same potential for delay that arises when assessing visual effects, in which the APE ranges from a half a mile to one and a half mile radius from tower sites. Further, the types of historic properties directly affected by towers include underground archeological sites that cannot readily be discovered other than by careful examination and study of the actual site. Therefore, although the ACHP believes that use of a streamlined approach for identifying historic properties subject to visual effects is reasonable and consistent with the NHPA and ACHP regulations, additional identification efforts, as set forth in the Nationwide PA, are called for when identifying historic properties directly affected by towers.

The ACHP looks forward to adoption of a National PA and believes that the proposed approach discussed in this letter adequately balances both the goals of historic preservation under the NHPA and the Commission's statutory responsibilities with respect to communications facilities.

Sincerely,

  
Javier Marqués  
Associate General Counsel

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<sup>1</sup> The telecommunications tower situation is markedly different from other Federal licensing/permitting programs. Accordingly, nothing in this letter should be interpreted as ACHP endorsement of the proposed approach as being adequate for such different licensing/permitting programs. For example, Section 404 (Clean Water Act) permits issued by the Corps of Engineers involve such a different permitting program since, among other things, the permits directly relate to specific projects, in specific sites, and the agency can ascertain effects prior to its permitting decision.